90-1270

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1990

STATE OF ALABAMA, PETITIONER,

v.

RAYMOND EUGENE BROWN, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA AND APPENDIX

OF

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

AND

WILLIAM DUNCAN LITTLE III
ALABAMA ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

OFFICE OF THE ATTORNEY GENERAL
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

QUESTIONS PRESENTED

1. UNDER WHAT CIRCUMSTANCES REGARDING PRE-TRIAL PUBLICITY IS A TRIAL COURT REQUIRED UNDER THE SIXTH AMENDMENT TO GRANT A DEFENDANT'S REQUEST FOR INDIVIDUAL VOIR DIRE OF THE JURY VENIRE?

2. IS REVERSAL REQUIRED FOR REFUSAL TO GRANT INDIVIDUAL VOIR DIRE WHERE A DEFENDANT AFFIRMATIVELY UTILIZES IN HIS DEFENSE THE VERY FACTS WHICH HE CLAIMS WERE PREJUDICALLY DISSEMINATED TO THE VENIRE THROUGH PRE-TRIAL PUBLICITY?

PARTIES

The parties in the lower courts were the same as those in this proceeding, the same being set out in the caption.

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OPINIONS AND ORDERS BELOW

A copy of the opinion of the Court of Criminal Appeals of Alabama reversing respondent's conviction is attached as Appendix A. A copy of the order of the Supreme Court of Alabama quashing certiorari as improvidently granted is attached as Appendix B.

JURISDICTION

The decision of the Court of Criminal Appeals of Alabama reversing respondent's conviction was issued on April 27, 1990 (see Appendix A). The order of the Supreme Court of Alabama quashing certiorari as improvidently granted was issued on November 16, 1990, and this petition is filed within ninety (90) days of this date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI, U.S. CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV, SECTION 1, U.S. CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Respondent was indicted on September 4, 1987, by the Grand Jury of Montgomery County, Alabama, for the capital offenses of the murder of two or more persons, murder while under sentence of life imprisonment, and murder during sexual abuse under Code of Alabama 1975, §13A-5-40 (C.R. 1-5). Respondent was arraigned that day and entered pleas of not guilty and not guilty of reason of insanity (C.R. 20).

Prior to trial respondent filed a motion for individual voir dire (C.R. 47-49). While the trial court initially indicated that it would grant this, at trial the court began to voir dire the panel as a whole. Respondent objected to this (C.R. 99-111).

Regarding pre-trial publicity, the trial court carefully explained to the venire the need for an impartial jury and then asked the veniremembers if because of what they had read or seen about the case they had formed any opinion which would interfere with their ability to base a verdict on the evidence (R. 97-99). The court then instructed the veniremembers to think about this matter over the noon recess (R. 99). After the recess the trial court asked the same question twice more (R. 99, 111-112).

After a jury was selected, the trial began. Respondent was convicted on March 23, 1988, of all three capital offenses. At a separate sentence hearing the jury, after considering

aggravating and mitigating circumstances, unanimously recommended a sentence of death (C.R. 6). The trial court, after independently weighing the aggravating and mitigating circumstances, agreed with the jury and sentenced respondent to death (C.R. 185).

On appeal respondent contended that the refusal to grant individual voir dire violated the Sixth and Fourteenth Amendments to the United States Constitution. The Court of Criminal Appeals of Alabama agreed with respondent's contention and reversed his conviction (see Appendix A). Petitioner's timely application for rehearing was denied.

On June 29, 1990, the Supreme Court of Alabama granted petitioner's petition for writ of certiorari. On

November 16, 1990, that court quashed the writ as improvidently granted (see Appendix B).

ARGUMENT

In Irvin v. Dowd, 366 U.S. 717, 722-723 (1961), this Court spoke to the question of the effect of pre-trial publicity on a defendant's right to an impartial jury.

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communications, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived motion as to guilt or innocence of an accused, without more, is sufficient to rebut the

> presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

This Court, however, has not announced any rule for the manner in which the questions directed toward juror impartiality must be posed. Instead, the Court has repeatedly indicated that the trial court has great discretion as to how voir dire shall be conducted. Rosalez-Lopez v. United States, 451 U.S. 182, 189 (1981); Ristaino v. Ross, 424 U.S. 589, 594 (1976); see, Ham v. South Carolina, 409 U.S. 524, 528 (1973). Even with regard to the sensitive area of racial discrimination in a capital case, the

trial court retains discretion, particularly as to whether the questions are asked to the venire collectively or individually. Turner v. Murray, 476 U.S. 28, 37 (1986). The federal courts have likewise recognized that in cases where there is pre-trial publicity, the trial court still has discretion as to whether individual voir dire will be allowed. United States v. Brunty, 701 F.2d 1375, 1378 (11th Cir.), cert. denied, 464 U.S. 848 (1983); United States v. Banks, 687 F.2d 967, 974-976 (7th Cir. 1982), cert. denied, 459 U.S. 1212 (1983); United States v. Crow Dog, 532 F.2d 1182, 1198 (8th Cir. 1976), cert. denied, 430 U.S. 929 (1977).

The Alabama Court of Criminal Appeals recognized that generally the

decision as to whether the voir dire is conducted collectively or individually is for the trial court's discretion. Raymond Eugene Brown v. State, 3 Div. 964 (Ala.Cr.App. April 27, 1990), (Appendix A, ms.op. at 8). The court below held, nonetheless, that a trial court's decision not to allow individual voir dire constitutes an abuse of discretion where there is a significant possibility of prejudice due to pre-trial publicity. Id., at 16.

There is discord among the lower courts as to the circumstances under which pre-trial publicity requires individual voir dire. Some courts have held, similar to the court below in this case, that individual voir dire is necessary where the nature of the publicity raises a significant

possibility of prejudice to the defendant. United States v. Holman, 680 F.2d 1340, 1347, reh. denied, 691 F.2d 512 (11th Cir. 1982); United States v. Colacurcio, 659 F.2d 684, 689 (5th Cir. 1981), cert. denied, 455 U.S. 1002 (1982).

Other courts have announced a much higher standard for reversal. Individual voir dire is required only where there is reason to believe the publicity was so prejudicial that it rendered a fair trial "impossible." Jackson v. Amaral, 729 F.2d 41, 45 (1st Cir. 1984). A defendant may be called upon to show actual juror prejudice in order to obtain reversal. United States v. Grey Bear, 883 F.2d 1382, 1393 (8th Cir. 1989), cert. denied, 110 S.Ct. 846 (1990).

The standard elsewhere is simply vague. Individual voir dire must be conducted where the publicity is "great," apparently without regard to the nature of the publicity. United States v. Giese, 597 F.2d 1170, 1183 (9th Cir.) cert. denied, 444 U.S. 979 (1979).

This case also presents an additional question of whether a defendant is entitled to individual voir because of prejudicial pre-trial publicity where the defendant himself utilizes the supposedly prejudicial facts as part of his defense.

In its opinion the Court of Criminal Appeals pointed out certain matters disclosed by pre-trial publicity. These include: (1) contentions that respondent had admitted the crime; (2) facts regarding

respondent's previous murders in 1960; (3) reference to respondent as "BladeBrown," and (4) the fact that respondent had been paroled and that this decision had been criticized.

Evidence of most of these, however, was not only admitted at trial, it was introduced by respondent himself. With regard to the facts regarding respondent's 1960 killings, respondent called as a witness Officer Graves, who was at the scene of the recent (1987) killings, and asked him to compare this with photographs of the 1960 crime scene for similarities (R. 581). Graves also testified specifically to the facts of the 1960 killings from old police reports (R. 585-586), and about respondent's behavior during the investigation of those crimes (R. 596-597). Furthermore, respondent's

two mental health experts, a psychologist and a psychiatrist, both relied on accounts of the 1960 killings in arriving at their opinions as to respondent's insanity (R. 624-625, 775). Respondent's attorney then argued the facts of the 1960 killings as evidence of his insanity (R. 1017-1020).

With regard to respondent's commission of the 1987 killings, respondent simply did not contest this. In order to emphasize his candor and his total reliance on the plea of not guilty by reason of insanity, respondent's attorney stated to the jury as follows:

> ...now I ask you to search your memory and see if there's any evidence that we have presented to you in this case, to in anyway suggest that Raymond Eugene Brown, Gene Brown was not the person who committed these crimes.

(R. 1015). Respondent's attorney then withdrew the plea of not guilty through his argument.

THE COURT: Mr. Blanchard, do you withdraw your plea of not guilty, is that what I heard you say?

DEFENSE: Yes, sir.

THE COURT: So you are strictly admitting the crimes, but now are saying insanity; is that correct?

DEFENSE: That's correct.

(R. 1017).

With regard to the fact that respondent had been paroled and that there was a controversy surrounding this, respondent used this to his advantage in closing argument.

> You can look at the [mental health] records, take a look at them. The fact that remains is, you've got Doctor Brown and Doctor Davis, who are here today, who have reviewed all the records and say that he was suffering from a psychosis; and the records will show you that they at [the mental hospital] did not diagnose a psychosis at that time. He was found guilty and sent to prison to serve his life sentence we've been talking about. And he was evaluated some more while he was in there. <u>And then he was paroled</u>. <u>The State of Alabama paroled him</u>. <u>More responsibility</u>. We have a man who is and was a dangerous psychotic. Responsibility? Ladies and gentlemen, where is it?

(R. 1033) (emphasis added.)

Respondent's argument was that the State of Alabama was the party responsible for the 1987 killings because it had paroled a dangerously psychotic man. Respondent, rather than

keeping from the jury the fact that he had been paroled, in essence joined in the public outcry against his parole in his argument to the jury.

With regard to respondent being denominated "Blade Brown," this was an alias under which he had been indicted (C.R. 2-5), and thus the jury was aware of it.

This case therefore presents the Court with the question of the correct standard for requiring individual voir dire due to pre-trial publicity, and also whether the trial court should be found to have abused its discretion by denying individual voir dire where the defendant himself utilizes in his defense the allegedly prejudicial facts disclosed by the publicity. The Court should grant certiorari to answer these questions.

CONCLUSION

For the above reasons the Court should grant the writ of certiorari.

Respectfully submitted,

JAMES H. EVANS
ALABAMA ATTORNEY GENERAL

WILLIAM DUNCAN LITTLE, III
ALABAMA ASSISTANT ATTORNEY GENERAL

ATTORNEYS FOR PETITIONER

APPENDIX

APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE ALABAMA COURT OF
CRIMINAL APPEALS

OCTOBER TERM, 1989-90

3 Div. 964

Raymond Eugene Brown, alias

v.

State

Appeal from Montgomery
Circuit Court
(CC-87-1464)

TYSON, JUDGE

Raymond Eugene Brown was indicted in a four-count indictment for the murder of two persons pursuant to one scheme or course of conduct, in violation of §13A-5-40(a)(10), Code of Alabama 1975; murder while the defendant

is under a sentence of life imprisonment, in violation of §13A-5-40(a)(6), Code of Alabama 1975 (two counts); murder during the course of sexual abuse in the first or second degree, in violation of §13A-5-40(a)(8), Code of Alabama 1975. The jury found the appellant guilty of all four capital offenses charged in the indictment. Following the sentencing phase of the trial, the jury unanimously recommended the death penalty. The trial judge accepted the jury's recommendation and sentenced the appellant to death.

On the afternoon of August 9, 1989, David LeMonte returned his six-year-old son, Aaron, to the home of David LeMonte's ex-wife and Aaron's mother, Linda LeMonte. Linda LeMonte's home

was located on Baffin Court in Montgomery, Alabama. Linda LeMonte; her ten-year-old daughter, Shelia Smoke; and the appellant were there when David LeMonte dropped off Aaron.

On the morning of August 10, 1989, Linda LeMonte's boss called Beverly Evans, Linda LeMonte's mother, and reported to her that Linda had not come to work. When Evans learned that her grandchildren were not at school, Evans and her husband went to Linda's house. When no one answered the door, Evans went to Aaron's bedroom and knocked on the window. Aaron came out from under the covers of his bed and went and opened the front door. Evans then discovered the body of her daughter in the living room and the body of her granddaughter in a bedroom.

Dr. Allan Stillwell performed the autopsies on the victims' bodies. Stillwell testified that Linda LeMonte died as a result of a nine-inch cut to her throat. LeMonte also sustained multiple stab wounds to other parts of her body including numerous stab wounds to the areas of the vagina, rectum and breasts. LeMontes' abdominal cavity was completely opened up by a twenty-seven inch cut which began in the lower portion of the neck and ended at the right side of the pubis in the lower abdomen.

At the time Shelia Smoke's body was discovered, a knife was protruding from her umbilicus. Very little of the knife blade was exposed. The autopsy performed on Smoke's body revealed that the cause of death was multiple stab

wounds to the chest, throat, and abdomen. Stillwell testified that there was evidence that Smoke had been sexually assaulted prior to her death.

A piece of paper with the names "Raymond," "Shelia," and "me" written on it was found beside LeMonte's body near some playing cards. A photograph of LeMonte's dead body was found on the television set. The appellant's fingerprint was found on this photograph and on a film roll in a camera which was lying on the sofa. Several knives were found in LeMonte's house, including one found in Smoke's bedroom which was identified as belonging to the appellant. Blood consistent with LeMonte's blood was found in the appellant's apartment and car.

Around 6:15 on the morning of August 10, 1989, prior to the discovery of the bodies of LeMonte and Smoke, State Trooper Mary B. Sterling went to the scene of an accident in Elmore County, Alabama, where a car had run off the road into a ditch. When she arrived at the scene, the driver of the car that ran off the road gave her his driver's license. The name of the driver's license was that of the appellant. When Sterling asked the appellant if he was hurt, the appellant told her that he was not. The appellant said that he had had too much to drink the night before and that he had run the car into the ditch. The appellant removed a grocery sack and a fishing rod from the trunk of his car and headed toward the river. Sterling then

had the appellant's car towed since she did not know how much the appellant had had to drink.

On August 12, 1989, Michael Williams, with the Montgomery County Sheriff's Department, was searching for the appellant in the Wallsboro area off Highway 231 in Elmore County. Williams stopped at an Amoco station, where he received a call that someone who fit the appellant's description had just come out of the nearby woods and was walking down the road. Williams approached this person and asked for identification. This person gave him a driver's license with the name Raymond Eugene Brown. The appellant was then taken into custody.

I

The appellant argues that the trial judge erred by refusing to allow individual voir dire of the jury venire concerning pretrial publicity. Prior to the voir dire of the jury, the following occurred:

> "[THE COURT:] I will voir dire the jury. I will--when I feel I have adequately asked all of the questions, either side can move the court to allow you to ask a few questions yourself, and I will consider that. Okay. If you feel there is something I haven't covered, I will consider that. Didn't you file a motion for individual voir dire?
>
> "MR. HOLLIFIELD: We have.
>
> "MR. BLANCHARD: Yes, sir.
>
> "THE COURT: Then we'll go one-on-one and just put the jury in the jury box and take them in the jury room and I will ask them the essential questions that we have to ask, and that's the way we'll do it.
>
> "MR. BLANCHARD: May we have a right to follow up on questions?

"MR. BLANCHARD: May we be heard on that?

"THE COURT: Sure.

"MR. EVANS: Your Honor, we feel that the court--we urge the court to reconsider calling out each individual voir dire.

"THE COURT: I think in this case, it's neccesary. I am going to voir dire the venire in mass. Then, of course, it may be necessary for me to call in individuals and ask them specific questions." (RR. 188-90.)

During the voir dire of the jury as a whole, the trial judge asked the following question:

"Now, ladies and gentlemen does anyone know anything about this case, either what you have heard, read, know first-hand, news media, anybody know anything about this case, okay, please stand." (R. 94).

Of the 66 members of the jury venire,[1] 42 members (or 63%) responded affirmatively. The trial judge then continued:

> "[THE COURT:] All right. Now, ladies and gentlemen, those of you who stood and stated that you had either read, heard, or talked about this particular case, this is one of the most crucial questions I have asked all morning. This is the question where the seriousness of your oath will come forth. You will understand the seriousness of it again, the only thing this court,--the thing this court is required to do, and these lawyers are required to do, is to strike or empanel a fair and impartial jury. That's what the system requires. That's what we intend to do. Is there any member of the venire who has heard, read, talked about, know anything about this case, or believes that you have already formed some opinion, have any

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[1]Originally there were 74 jurors on the venire but the number was reduced to 66 when the trial court released 8 jurors before voir dire began.

preconceived ideas, have a predisposition to the extent that it would interfere with your ability to go into the jury room with the rest of the jurors, if you are selected to serve on this jury, and that you could not sit with the rest of the jurors, absorb the evidence, listen to the evidence, weigh it, sift through it, and at the appropriate time, render a fair and impartial verdict, based on the evidence, and the law that I charge you is applicable in this case? I'm going to give you until 1:30 to make that decision, because we are going to take a lunch break. I want to let you think about that question because that's the crucial question in this case, where those that have read or heard something about this case, could you still be a fair and impartial juror. Court will be in recess until 1:30.

"(Noon recess).

"BY THE COURT: All right, the question I asked you just before lunch, any member of the venire believes or those that stood said that you had heard, read, talked about this matter, either one of you feel that it would interfere with your ability to render a fair and impartial verdict with the rest of the jurors, after listening to the evidence and the law that I charge you that is applicable in this case, if you would, please stand? And further questions." (R. 97-99.)

At this point, defense counsel requested a hearing outside the presence of the jury. Defense counsel stated that due to the unusual amount of pretrial publicity, he wished to individually question the jury venire about what they had heard or read about the case and how any publicity about the case had affected them. Defense counsel told the judge that individual voir dire was particularly important since the trial judge had stated in his order denying the motion for change of venue that a thorough and extensive voir dire was the best method of demonstrating jury prejudice. Defense counsel stated that he did not believe that the jury had been thoroughly examined on the issue of pretrial publicity and that he felt that the

jurors might be reluctant to admit that they could not be fair and impartial in front of the entire venire. In response, the court stated that he believed that individual voir dire was necessary only if a prospective juror equivocated as to whether he or she could be fair and impartial. The court then asked the jury venire the following questions:

> "BY THE COURT: Does any juror member of the venire know of any reason, any reason whatsoever that you believe that you should not be selected to serve on this jury? If you do, stand, I'll take you in chambers and find out what the reason is.... Any juror again, any juror know of any reason, and particularly those who stood this morning and said that you had read, heard talked about on the news media or otherwise, something concerning this case? Based on that, anyone know of any reason based on what you have heard that you should not or believe that you should not sit on this jury? Anyone has any predisposed position about this case, what you have

heard, read, or said or talked about? Anyone in your mind feel that you could not be fair in this matter, or render a fair, impartial verdict based on the evidence and the law, based on what you have heard, read, seen or talked about? Anyone else, believe that--just come forth, anyone else?" (R. 111-12.)

At this time two of the jurors were taken into chambers. Each juror admitted separately that they could not be fair and impartial because of the things they had heard about this case in the news media. The trial judge excused these two jurors and defense counsel renewed the request for individual voir dire. Defense counsel stated that the fact that these two jurors did not come forward when the trial judge initially asked the question concerning their ability to be impartial was evidence of the need for individual voir dire. The trial judge

then denied defense counsel's request to examine the jurors separately regarding pretrial publicity, and the jury was struck.

The appellant contends that the trial court's denial of his request to individually voir dire the jury venire was error. As a general rule, the decision whether to voir dire prospective jurors individually or collectively is within the sound discretion of the trial court. Waldrop v. State, 462 So. 2d 1021 (Ala.Crim.App. 1984), cert. denied (Ala.), cert. denied, 472 U.S. 1019, 105 S.Ct. 3483, 87 L.Ed. 2d 618 (1988). This is true even in a death case; Edwards v. State, 452 So.2d 487 (Ala.Crim.App. 1982), rev'd on other grounds, 452 So. 2d 503 (Ala. 1983); Bell v. State, 475 So.2d 601

(Ala.Crim.App. 1984), aff'd, 475 So. 2d 609 (Ala.); cert. denied, 474 U.S. 1038, 106 S.Ct. 607, 88 L.Ed. 2d 585 (1985); Whisenhant v. State, 555 So.2d 219 (Ala.Crim.App. 1988), cert. denied, 555 So.2d 235 (Ala. 1989), (court allowed defense counsel to individually voir dire venire concerning knowledge of the facts of the defendant's case and the prior sentences he had received and concerning pretrial publicity). However, the trial court's discretion in this matter is "limited by the requirements of due process." United States v. Hawkins, 658 F.2d 279, 283 (5th Cir. 1981). "Individual questioning may be necessary in some circumstances to gain assurance that all prejudice has been exposed." United States v. Hurley, 746 F.2d 725, 727 (11th Cir. 1984).

In Jordan v. Lippman, 763 F.2d 1265 (11th Cir. 1985), the Eleventh Circuit Court of Appeals held that the defendant was deprived of due process and his right to an impartial jury because the trial judge failed to individually voir dire the jurors as to whether they had been exposed to some prejudicial publicity which had occurred during the trial. The holding in Jordan stems from the Fifth Circuit Court of Appeals' decision in United States v. Davis, 583 F.2d 190 (5th Cir. 1978). In Davis, the case was the subject of extensive pretrial publicity. Prior to trial, defense counsel filed a motion requesting the opportunity to individually examine each juror who had been exposed to the publicity to determine the extent to

which the juror had been exposed to the publicity and how it had affected that juror. Defense counsel also introduced the pretrial publicity into the record. After determining during voir dire that all of the prospective jurors had heard about the case, the trial judge asked the jurors if their exposure to the pretrial publicity affected their ability to be impartial. None of the jurors responded. The trial judge then denied defense counsel's request to individually voir dire the jurors concerning the effect of the pretrial publicity on them.

The Davis court, citing the ABA Standards Relating to Fair Trial and Free Press, held that merely asking the jury panel as a group whether the pretrial publicity affected their

ability to be impartial was inadequate under the circumstances of the case and stated that the trial court "should have determined what in particular each juror had heard or read and how it affected his attitude toward the trial" so that the trial court could determine "for itself whether any juror's impartiality had been destroyed." Davis, 583 F.2d at 196-97.

> "A fundamental principle of due process requires that the jury's verdict be based on evidence received in open court, not from outside sources. Sheppard v. Maxwell, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d at 751 (1961). A juror's impartiality is not necessarily destroyed when he is exposed to pretrial publicity. 'It is sufficient if the juror can lay aside his impression or

> opinion and render a verdict based on the evidence presented in court. Irvin v. Dowd, 366 U.S. 723, 81 S.Ct. at 1643, 6 L.Ed.2d at 756; see Calley v. Callaway, 519 F.2d 184, 205-06 (CA5, 1975) (en banc), cert. denied, 425 U.S. 911, 96 S.Ct. 1505, 47 L.Ed.2d 760 (1976). But when a juror is exposed to potentially prejudicial pretrial publicity, it is necessary to determine whether the juror can lay aside any impression or opinion due to the exposure. The juror is poorly placed to make a determination as to his own impartiality. Instead, the trial court should make this determination."

Davis, 583 F.2d at 197.

In a later case, United States v. Gerald, 624 F.2d 1291 (5th Cir. 1980), cert. denied, 450 U.S. 920, 101 S.Ct. 1369, 67 L.Ed. 2d 348 (1981), the Fifth Circuit Court of Appeals, while reaffirming the principles set out in

its opinion in Davis, found that the district court did not err by failing to conduct the type of inquiry described in Davis because there was no evidence in the record of the nature or extent of the pretrial publicity in that case.

> "The time consuming, probing, preferably individual voir dire described in Davis generally is not required in cases involving unsupported general allegations of prejudicial pretrial publicity or in cases where the publicity does not create a significant potential of prejudice."

Gerald, 624 F.2d at 1298. See also United States v. Holman, 680 F.2d 1340 (11th Cir. 1982) (no significant possibility of prejudice where publicity was of "innocuous factual nature" and "much of it consisted of information which would have been

admissible at trial"); Waldrop (individual voir dire not required because "appellant offered no evidence of the extent of any prejudicial pretrial publicity"); Hurley (possibility of prejudice not great enough to require individual questioning of jurors).

The Eleventh Circuit Court of Appeals in Jordan stated that "[t]he continued vitality of the principle elucidated in the Davis case -- significant possibility of prejudice plus inadequate voir dire -- has been evidenced by binding precedent in this circuit." Jordan, 763 F.2d at 1275 (citations omitted). This court adopted the reasoning of the federal

courts in Waldrop v. State, 462 So.2d 1021 (Ala.Crim.App. 1984), cert. denied (Ala. 1985).

Thus, we must determine whether the pretrial publicity in this case created a "significant possibility of prejudice." There is little doubt that the case at bar generated extensive pretrial publicity. In support of his motion for a change of venue, the appellant introduced 53 exhibits. These exhibits were newspaper articles and transcripts of radio and television broadcasts. Many of the newspaper articles were front page stories and many of the television and radio broadcasts were the lead stories. Our examination of these exhibits, as illustrated below, leads us to the conclusion that there did exist a

"significant possibility of prejudice" due to the pretrial publicity in this case.

Shortly after the murders in this case occurred, a deputy district attorney stated that this case was "one of the most graphically horrible cases we've had since I've been a DA" and "if any case called for the electric chair Brown's does." Montgomery Chief of Polic John Wilson referred to the crime scene as "one of the most hideous ... in this area in a long time."

The appellant remained at large after the murders for several days. During this time, Chief Wilson was quoted as saying that the appellant was "extremely dangerous" and that he was a "psychopathic killer who killed for the pleasure of it."

One article printed during this time stated that LeMonte's neighbors were uneasy and that the children who lived in the neighborhood were scared the appellant was coming to get them. Numerous stories about the massive manhunt for the appellant were published, as were the details of the appellant's capture and arrest. Even the fact that the deputy sheriff who arrested the appellant was honored was reported in the media. Details of the victims' funerals were published, including a picture of LeMonte's young son being hugged by his father.

Several reports stated that the appellant, by waiving his hearing to determine whether he had violated the conditions of his parole, had admitted that he murdered LeMonte and Smoke.

The appellant's parole officer stated that he had no doubt that the appellant was confessing to the murders when he signed the waiver. The parole officer also told the press that the appellant told him that he "did it" and that he gave a statement to the police. It was also reported that a deputy district attorney said that she understood the appellant had confessed to the murders. A psychologist who evaulated the appellant was quoted as saying that there was no evidence that the appellant was psychotic. It was also reported that the psychologist stated that the appellant claimed to have had a memory lapse only as to the day in question.

Almost every article or broadcast mentioned that the appellant had murdered his aunt, his grandmother, and

his great-grandmother in Ashland, Alabama when he was 14 years old in 1960. Some of the articles stated that the killings in 1960 were "identical" to the present murders, and the appellant was referred to as the "boy-killer." Someone from Ashland was quoted as saying that he couldn't "remember ever seeing him [the appellant] cry" after his relatives were murdered. One report stated that the appellant had made "threats against many people in Ashland" and that a "fear of another bloodbath lives." Another article alleged that people in Ashland were scared to talk about the appellant due to a "fear of reprisal." A deputy district attorney stated that the appellant should have been given the death penalty in 1960.

Many articles also reported that the appellant had been convicted of assault in the third degree (some articles referred to this conviction as attempted murder) for attempting to choke his landlord. The appellant had been paroled from his imprisonment for the murders of his relatives at the time this assault offense occurred and his parole was revoked because of this assault. The appellant was on parole again at the time he killed LeMonte and Smoke. It was also published that the appellant was known as "Blade Brown" by fellow prison inmates and that they described the appellant as "half-Indian."

By far the vast majority of the publicity in this case concerned the fact that the appellant was on parole at the time he committed these

murders. This aspect of the case received statewide attention. The Board of Pardons and Parole was heavily criticized for the Board's decision to parole the appellant in spite of his violent history. The Victims of Crime and Leniency (VOCAL) Organization strongly protested the Board's action in this matter and the group held several news conferences on the subject. Montgomery Chief of Police John Wilson was also critical of the Parole Board's decision to parole the appellant. The attorney who represented the appellant when he was tried for the murders of his relatives in 1960 told the press that the appellant should never have been let out of prison. He said that he had had reason to believe that the appellant

would kill again and that he would have told the Parole Board this fact if he had been asked. A deputy district attorney told the press that the district attorney's office was never notified that the appellant was living in Montgomery after he was paroled. As a result of this case, a grand jury investigation was instigated to determine if the Parole Board was too lenient in granting the appellant parole. At least two editorial commentaries were written concerning this matter, including one which stated:

> "By now everyone thinks he understands the mistake made with Raymond Eugene Brown. When an otherwise well-balanced 14-year-old boy carves up his 31-year-old aunt with 123 knife slashes leaving her laid open groin to throat, there's a sexual screw loose somewhere."

Although some of the details reported by the media were properly admitted at the appellant's trial (and thus the jury was not harmed by their pretrial exposure to these facts), most of the information reported was not and would not have been admissible at trial. As we illustrated above, much of the publicity concerning this case was, at the least, potentially prejudicial and at least 63% of the jury venire was exposed to this publicity. The trial judge must have realized that the publicity concerning this case was getting out of hand, since he eventually issued a gag order in this case. However, this was after a great deal of potentially prejudicial information had been published concerning this case.

As we stated earlier," where there exists a significant possibility of

prejudice [due to pretrial publicity] the jurors must in the first instance be questioned as to whether they were exposed. Further inquiry as to the nature of the exposure is then undertaken, if necessary." Jordan, 763 F.2d at 1281 (11th Cir. 1985).

The trial judge's voir dire questions to the jury venire in the case at bar concerning their ability to be impartial were very similar to the examination conducted by the court in Davis, which was found to be inadequate. Here, as in Davis, the court, after determining how many jurors had been exposed to publicity about the case, asked these jurors as a group whether they could be impartial in spite of what they had heard or read about the

case. This left the determination as to whether they could be impartial with the jurors themselves. This is a determination which should have been made by the trial judge in this instance.

As this court has stated on numerous occasions, the usual and best method for demonstrating actual jury prejudice is by an extensive and thorough voir dire examination. Arthur v. State, 472 So.2d 650 (Ala.Crim.App. 1984), rev'd, 472 So.2d 665 (Ala. 1985) (cited by the trial judge in his order denying the motion for a change of venue). Here the question concerning the jurors' ability to be impartial, asked in different ways, was insufficient to expose potential juror prejudice due to the extensive pretrial publicity. This is evidenced by the fact that it was not

until the third time that this question was asked that any jurors responded to this question.

The trial judge should have asked those jurors who had been exposed to the pretrial publicity in this case about the extent of their knowledge of the case. Then the trial judge could have independently determined whether any juror's knowledge about this case haddestroyed his or her ability to be fair and impartial. This would have allowed the trial judge to determine for himself whether the juror could lay aside any impression or opinion due to pretrial publicity. We must emphasize that this type of inquiry need be undertaken only where the accused demonstrates potential prejudicial publicity and juror exposure to that

publicity. However, "when the nature of the publicity as a whole raises a significant possibility of prejudice, and a juror acknowledges some exposure to that publicity, more than the abbreviated questioning conducted in Davis and in the case sub judice is necessary." Hawkins, 658 F.2d at 285.

> "Where there is a significant possibility of prejudice, the trial court must ensure that voir dire is sufficient to unearth potential prejudice in the jury pool. . . . Consequently, a defendant is deprived of due process and his right to an impartial jury if the voir dire procedure is so limited that it cannot uncover prejudice."

Berryhill v. Zant, 858 F.2d 633, 641 (11th Cir. 1988) (Clark, J., concurring).

As noted in Trujillo v. Sullivan, 815 F.2d 597, 606-07 (10th cir.), cert. denied, 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987),

> "[E]very criminal trial must conform to constitutional standards, [and] our scrutiny in capital trials must be particularly sensitive. Capital trials are unique and ponderous occurrences, distinct from any other exercise of state power. When the machinery of the state seeks to extinguish a life, we must especially ensure that the process employed to accomplish that end complies with the defendant's right to a fair trial by an impartial jury."

Therefore, since the trial judge's voir dire examination of the jury venire was inadequate to allow him to make an independent determination as to whether the jurors' impartiality had been destroyed by the extensive and

prejudicial publicity in this case, we must reverse the judgment and remand this case to the trial court. We pretermit consideration of the other issues raised on appeal due to our decision in this matter. The judgment is hereby reversed and the cause is remanded.

REVERSED AND REMANDED.

All the Judges concur.

APPENDIX B

SUPREME COURT OF ALABAMA

October Term, 1990-91

89-1421

Ex parte State of Alabama

PETITION FOR WRIT OF
CERTIORARI TO THE COURT
OF CRIMINAL APPEALS

(Re: Raymond Eugene Brown, alis

v.

State)

(Montgomery Circuit Court, CC-87-1464)

PER CURIAM.

WRIT QUASHED AS IMPROVIDENTLY GRANTED

Hornsby, C. J., and Maddox, Jones, Almon, Shores, and Adams, JJ., concur.

Houston and Steagal, JJ., dissent.

STEAGAL, JUSTICE (dissenting).

Alabama courts have long held that individual voir dire examination of prospective jurors is not mandatory, even in a capital case, but, rather, that the decision to allow a request for individual voir dire lies within the sound discretion of the trial court. Whisenhant v. State, 555 So.2d 219 (Ala.Cr.App. 1988), affirmed, Ex parte Whisenhant, 555 So.2d 235 (ala. 1989), cert denied,· _____ U.S. _____ , 110 S.Ct. 3230 (1990); Hallford v. State, 548 So.2d 526 (Ala.Cr.App. 1988), affirmed, Ex parte Hallford, 548 So.2d 547 (Ala. 1989), cert. denied, _____ U.S. _____, 110 S.Ct. 354 (1989); Bell v. State, 475 So.2d

601 (Ala.Cr.App. 1984), affirmed, 475 So.2d 609 (Ala. 1985), cert. denied, 474 U.S. 1038 (1985).

During its voir dire examination, the trial court had the opportunity on three occasions to observe the members of the venire and to consider their responses to the voir dire questions. Because the trial court was in a better position to understand and evaluate the events that took place during voir dire examination, I believe that the court should be allowed to decide whether individual voir dire examination was required. In my opinion, the trial court did not abuse its discretion in denying the request for individual voir dire examination in this case. Hallford, supra.

Therefore, I respectfully dissent from the order quashing the writ. I would review this case and reverse the Court of Criminal Appeals' holding requiring individual voir dire examination of jurors.

Houston, J., concurs.

CERTIFICATE OF SERVICE

I, William Duncan Little, III, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this _____ day of February, 1991, I did serve the requisite number of copies of the foregoing petition on counsel for Raymond Eugene Brown, respondent, by placing said copies in the United Postal Service, first class postage prepaid, and addressed as follows:

Hon. Charles P. Hollifield
100 Commerce Street
Montgomery, Alabama 36104

Hon. William R. Blanchard
505 South Perry Street
Montgomery, Alabama 36104

_____
WILLIAM DUNCAN LITTLE, III
ATTORNEY FOR PETITIONER

Address of Counsel:
Office of the Attorney General
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

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MAR 29 PAGE 3

90-1270

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF ALABAMA, Petitioner

v.

RAYMOND E. BROWN, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

WILLIAM R. BLANCHARD
505 South Perry Street
Montgomery, Alabama 36104
(205) 269-9691

CHARLES P. HOLLIFIELD
100 Commerce Street
Montgomery, Alabama 36104

Counsel for Respondent

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STATEMENT OF THE FACTS

Raymond Eugene Brown, respondent, was accused of the murders of Linda LeMonte and Sheila Smoke shortly after their bodies were discovered on August 9, 1987 near Montgomery, Alabama. Mr. Brown had recently been released on parole from a state prison in Alabama for a prior murder conviction that was charged against him when he was fourteen years old. The deaths of Linda LeMonte and Sheila Smoke, and the pursuit and apprehension of Mr. Brown received extraordinary media coverage in the Montgomery, Alabama area. Defense exhibits establish that the manhunt for Mr. Brown had residents "bolting their doors and taking up arms" and was described as one of the largest in Alabama's history.

At least eight law enforcement agencies, tracking bloodhounds, helicopters and even speedboats were employed in the initial investigation.[1] Mr. Brown was consistently described by police officers in news accounts as "extremely dangerous,"[2] "a

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1. References to media accounts are specific to the report source in the Montgomery area. All media reports are contained in 53 defense exhibits admitted at trial during pre-trial proceedings.

2. (*Montgomery Advertiser*, A1, 8/12/87, "Police Hunt for Suspect in Slayings"; WKAB, TV32, 8/ 11/87; WLWI Radio, 8/11/87, 8/12/87; WSFA, TV12, 8/11/87; Action 8 TV, 8/11/87, 8/12/87; UPI, 8/11/87; Defense Exh.16, Radio Broadcast, 8/12/87, Motion for Change of Venue; Defense Exh.__, Radio Broadcast, 8/11/87, Motion for Change of Venue).

psychopathic killer"[3] and someone "who kills for the pleasure of it." (Defense Exh.__, Radio Broadcast, 8/11/87, 8/13/87, Motion for Change of Venue).

Montgomery County deputy district attorney Ellen Brooks' personal opinions about the case were frequently quot in local media. Ms. Brooks was quoted in the newspapers as saying that Mr. Brown was responsible for "one of the most graphically horrible cases we've had since I've been a district attorney", (*Montgomery Advertiser*, A1, 8/14/87, "Friends, Family Mourn Victims") and additionally stated that "if any case called for the electric chair Brown's does." (Defense Exh.__, Radio Broadcast, 8/14/87, Motion for Change of Venue). Descriptions of the killings and crime scene were consistently graphic, detailed, and inflammatory in tone.

After Mr. Brown's arrest, several newspapers and electronic media incorrectly reported that Mr. Brown had admitted committing the murders by waiving a parole revocation hearing. (*Montgomery Advertiser*, D1, 9/9/87, "Convicted Triple-Murderer Faces 4 New Capital Charges"; *Montgomery Advertiser*, C1, 11/17/87, "Officer: Brown Admitted Killings"; WSFA, TV12, 8/17/ 87, 9/8/87; UPI, 8/18/87). Mr. Brown's parole officer told the press that he had no doubt that Mr. Brown was confessing to the murders by signing the hearing waiver, that Brown had said he "did it", and that

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3. (WKAB, TV32, 8/11/87; WLWI Radio, 8/11/87; WSFA, TV12, 8/11/87, 8/12/87; UPI, 8/11/87; Defense Exh.16, Radio Broadcast, 8/11/87, Motion for Change of Venue; Defense Exh.__, Radio Broadcast, 8/11/87, 8/12/87, Motion for Change of Venue).

Brown had given a statement to the police.[4] Deputy district attorney Ellen Brooks also misleadingly informed the press that Brown had confessed to the murders (Action 8 News, 5:30 p.m., 8/18/87; WACV NewsRadio, 8/18/87, 7 a.m.; WSFA, TV12, 8/17/87, 9/8/87).

Even before Mr. Brown's arrest, every article and broadcast about this case made mention of the fact that Mr. Brown had previously been convicted of the murder in 1960 when he was 14 years old. Some articles said the 1960 killings were "identical" to the present murders. Some referred to Mr. Brown as "Blade Brown" and "the boy-killer" and reported that he had made threats against many people in his home town of Ashland where "fear of another bloodbath lives." (*Montgomery Advertiser*, A1, 8/12/87, "Double-Murder Suspect Has Violent History"; see also, WSFA, TV12, 8/12/87). Prosecuting attorney Ellen Brooks was quoted as saying Brown should have been given the death penalty in 1960. (WLWI Radio, 8/14/87, 6:40 a.m., 8:40 a.m.).

The fact that Mr. Brown was on parole at the time of the present offense received extraordinary attention and occasioned strong criticism of the parole board from a local organization calling itself Victims of Crime and Leniency (VOCAL), Montgomery Chief of Police John Wilson, and the editorial boards of several newspapers (*Montgomery Advertiser*, B1, 8/23/87, "A New Chairman

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4. (*Montgomery Advertiser*, 11/17/87, C1, "Officer: Brown Admitted Killings"; *Alabama Journal*, 11/16/87, "Attorneys Want Brown's Words Excluded in Trial"; WKAB, TV32, 11/16/87).

Gets an Old Problem"; *Montgomery Independent*, 4, 8/20/87, "Eyes on the Parole Board"). Pete Mathews, Mr. Brown's defense attorney in his previous murder trial, said "I would have told [the parole board] not to release him. I know facts that lead me to believe if released he would do it again."[5]

As a result of Mr. Brown's case, a grand jury investigation was instigated into whether the parole board was too lenient when it granted Mr. Brown parole. This investigation also received extensive publicity and coverage. (*See e.g.*, *Montgomery Advertiser*, D2, 10/14/87, "Parole Board Law Under Grand Jury Scrutiny"). Most news stories reported that people who get sent to prison quickly get paroled and that many parolees pose a threat of violence (*See e.g.*, WSFA, TV12, 11/2/87, 11/4/87). Parole board member John Porter responded to criticism about his role in releasing Brown by saying, "[t]he public wants guarantees. The terrible fact is there are no guarantees short of the electric chair." (*Montgomery Advertiser*, G1, 9/6/87, "Victims Rights Advocates Question Parole Process").

An indication of the extraordinary notoriety of this case is its inclusion in the *Montgomery Advertiser's* year-end survey of the issues that had dominated 1987. (*Montgomery Advertiser*, A1, 12/26/87, "Politics, Crime, Health Issues Dominate 1987").

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5. (*Montgomery Advertiser*, A1, 8/13/87, "Brown's Ex-Attorney Knew Parole Was Questionable"; WACV NewsRadio, 8/13/87, 8 a.m., 10:36 a.m., 11 a.m., 11:30 a.m., 12:06 p.m.; WSFA, TV12, 8/13/87).

Before jury selection began in this case dozens of news accounts, reports, editorials, statements and comments by criminal justice system officials had shaped strong community sentiment against Mr. Brown through the local media. Many of the news reports were very inflammatory, most assumed Mr. Brown's guilt and a significant number prejudged that a death sentence should be imposed.

Trial counsel for Mr. Brown sought a change of venue from Montgomery County prior to trial due to the extensive pre-trial publicity in the Montgomery area. Despite the 53 exhibits submitted by Mr. Brown documenting this highly prejudicial publicity, the trial court denied Mr. Brown's motion for change of venue stating that prejudice could not be presumed at that time and that the best way to demonstrate actual jury prejudice would be by extensive and thorough voir dire. Brown v. State, __ So.2d __, 3 Div. 964, slip op. at 7 (Ala.Crim.App. 1990).[6]

During voir dire, 42 members of the 66 member panel (63%) admitted to having heard or read some of the pretrial publicity about Mr. Brown's case. (R. 94). Trial counsel made repeated motions for individual voir dire to explore the extent and nature of the prejudice resulting from the pretrial publicity which were all denied by the trial court. Brown at 4-8. Instead, the court merely asked individual jurors to stand if, as a result of what they had heard in the press, they did not think they could be

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6. The judge did issue a gag order to prevent attorneys from commenting about the case to the press. Brown at 16.

impartial and render a verdict based solely on the evidence presented in court. (R. 97-99). No jurors stood. (R. 97-99).

The defense again requested individual voir dire veniremembers and was again denied permission individually examine potential jurors by the trial judge. The trial court simply repeated its question. (R. 111-112). Finally, two jurors stood and admitted that they did not think they could be impartial based on what they'd read and opinions they had formed and both were excused for cause. Brown at 8.

Most of what was reported in the press and pre-trial coverage of this case was clearly inadmissible at Mr. Brown's trial and highly inflammatory in tone. Personal opinions about Mr. Brown's guilt, the propriety of the death penalty, other crimes accusations, incorrect reports about admissions and other statements were clearly not something that a juror could constitutionally carry into the jury before trial began. The Court of Criminal Appeals readily found that there was a "significant possibility of prejudice" as a result of the pretrial publicity surrounding this case. Brown v. State, __ So.2d ___, 3 Div. 964, Slip Op. at 12 (Ala. Crim. App. 1990).

The Court of Criminal Appeals further found that the trial court's general and conclusory questions of the jury panel *en masse* did not provide any basis upon which the court could properly base its required finding that the jurors' impartiality had not been destroyed by exposure to pretrial publicity. Brown at 18. Based on the record and the particularly sensitive scrutiny

required in capital cases, the Court of Criminal Appeals held that the limited voir dire in Mr. Brown's case violated his rights to due process under the Fourteenth Amendment and the Sixth Amendment right to a fair trial by an impartial jury. Brown at 18.

REASONS FOR DENYING REVIEW

A. Where Settled Law is Properly Applied to Case Specific Facts, This Court Should Not Exercise Certiorari Review

The State of Alabama's application for certiorari should be denied because it presents no important issue or question of law for review by this Court. Respondent's conviction and death sentence were overturned because the trial judge below failed to make an adequate inquiry into whether extraordinary pre-trial publicity and media coverage undermined jurors' ability to fairly try the accused. There is no conflict among lower courts that where there is evidence that venirepersons have been exposed to prejudicial and biased media accounts and reports against an accused, trial courts must take steps to ensure that jurors are impartial, can apply a presumption of correctness and convict based solely on the evidence.

Although 63 percent of the jury venire openly admitted exposure to extremely prejudicial and false information about Respondent's case, the trial court restricted inquiry into the scope of prejudice and each juror's ability to fairly adjudicate Respon-

dent's guilt or innocence. The law on this issue is settled, a trial judge must reliably establish that a capital defendant will not be tried by a jury that has been tainted with inadmissible hearsay and press reports which are extremely prejudicial.

Moreover, the decision below rests independently on state law grounds as well as federal authority and consequently should not be reviewed by this Court. The appellate courts of Alabama have held that as a matter of state law the prejudicial effects of extreme pre-trial publicity must be controlled in a criminal case. Waldrop v. State, 462 So.2d 1021 (Ala.Cr.App. 1984). The Alabama courts have adopted the view that under state law "the usual and best method for demonstrating actual jury prejudice is by an extensive and thorough voir dire examination. Brown, 571 So.2d at 352, *quoting,I* Arthur v. State, 472 So.2d 650 (Ala. 1984), *rev'd*, 472 So.2d 665 (Ala. 1985).

The Petitioner's claim that some of the allegedly prejudicial information was ultimately admitted at trial in no way justifies the trial court's failure to make sure that trial jurors would not convict Mr. Brown based on pre-trial rumors, media speculation or community bias. It would wholly unjust to allow an accused to be tried by a jury saturated with presumptions of guilt, pre-trial bias and animosity toward the accused by concluding that the defendant's efforts to contain or confront pre-trial bias somehow makes the partiality of jurors permissible.

The facts surrounding this case are additionally unique in that they reveal an unparalleled media focus on the accused that

was exceptionally inflammatory and potentially prejudicial. For these reasons and the reasons below, this Court should deny the petition for certiorari filed by the State of Alabama.

B. This Court's Clearly Established Constitutional Guidelines Dictate the Lower Court's Decision.

It is axiomatic that the constitutional guarantee of fair trial by an impartial jury requires that jurors not come into the trial proceedings with opinions or beliefs about the defendant's guilt which have been improperly shaped or formed by pretrial publicity. A juror must render a verdict based solely on the evidence presented in court. Irvin v. Dowd, 366 U.S. 717, 723 (1961); Spies v. Illinois, 123 U.S. 131 (1887); Holt v. United States, 218 U.S. 245 (1910); Reynolds v. United States, 98 U.S. 145 (1878). The Supreme Court has recognized that "[t]he life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media . . . due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial." Estes v. Texas, 381 U.S. 532, 540 (1965).

The United States Constitution and the State Constitution of Alabama assures to every person accused of a criminal offense a presumption of innocence. The Supreme Court has acknowledged that the most priceless safeguard of individual liberty and dignity is the Sixth Amendment right to trial by an impartial jury. Irvin v. Dowd, 366 U.S. 717, 721 (1961).

> In essence, the right to jury trial guarantees to the accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. . . .In the language of Lord Coke, a juror must be "indifferent as he stands unsworne." Co Litt 155b. . . .This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807). "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155 (1878).

Irvin at 722.

The Court has acknowledged that due process requires "that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). This Court has long recognized that

> [v]oir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled [citations omitted]. Similarly, lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges. . . .

Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981).

Whether or not a juror is impartial is a mixed question of law and fact and should be tried, as far as the facts are concerned, like any other issue of that character, upon evidence. Reynolds v. United States, 98 U.S. 145 (1878). Voir dire examination is the process by which both the court and attorneys obtain the objective information necessary to assess juror qualification. Unless jurors are asked specifically about what they read and what their reactions to the publicity were, the trial court has no basis upon which to make its findings of juror qualification.

At one time, it was thought sufficient for a juror to simply give a general assurance that she or he could lay aside her opinions and decide the case solely on the evidence. Aldridge v. United States, 283 U.S. 313, n.3 (1930). However, courts now recognize that jurors may hold biases of which they themselves are unaware but which nonetheless disqualify them from impartially sitting on a case. As a result, "the juror's assurances that he is equal to [his] task cannot be dispositive of the accused's rights," Murphy v. Florida, 421 U.S. 794, 800 (1975). It is therefore crucial that an informed *judicial* determination of impartiality be made.

In order to determine whether a juror can in fact uphold his duty to impartially decide a case based only on the evidence presented in court, the trial court must ascertain what materials and information a juror has been exposed to and assess what the result of that exposure has been. Individual sequestered voir

dire is often, in fact, the only adequate method by which this can be accomplished without simultaneously tainting all other potential jurors.

In concluding that Mr. Brown's rights to a fair trial were violated, the Court below followed well established constitutional guidelines, state law and recognized extraordinary evidence of pre-trial bias and prejudice against the accused. The decision of the Court below should therefore not be reviewed by this Court and the State's application for certiorari should be denied.

CONCLUSION

The State's application for certiorari review should be denied.

Respectfully submitted,

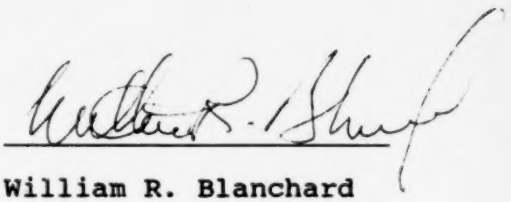
WILLIAM R. BLANCHARD
505 South Perry Street
Montgomery, Alabama 36104
(205) 269-9691

CHARLES P. HOLLIFIELD
100 Commerce Street
Montgomery, Alabama 36104

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached document has been served on counsel for the petitioner, William D. Little at the Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130, this 12th day of March, 1991 by first class United States mail, postage pre-paid.



William R. Blanchard